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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PAUL C. BOLIN, Plaintiff and Appellant, v. HERMAN A.D. FRANCK V et al., Defendants and Respondents.	A105923 (San Francisco County Super. Ct. No. 311426)

Plaintiff Paul C. Bolin is an inmate of San Quentin. He unsuccessfully sued San Quentin officials in federal court for alleged violations of his civil rights. He then sued his attorneys in the civil rights action, defendants Herman A.D. Franck V and Stephen T. Gargaro, for legal malpractice. The San Francisco Superior Court dismissed plaintiff's legal malpractice action because plaintiff—who was incarcerated in San Quentin—failed to appear for trial. Plaintiff contends the dismissal was error because the superior court failed to ensure his access to the courts. Under the authority of *Wantuch v. Davis* (1995) 32 Cal.App.4th 786 (*Wantuch*), we reverse because the superior court did virtually nothing to ensure plaintiff's right of access.

I. FACTS

As did the court in *Wantuch*, we supplement the record on appeal by taking judicial notice of the superior court file. (Evid. Code, § 452, subd. (d); see *Wantuch, supra,* 32 Cal.App.4th at p. 790, fn. 1; see also *Smith v. Premier Alliance Ins. Co.* (1995)

41 Cal.App.4th 691, 694, fn. 1.) At all relevant times plaintiff was, as he continues to be, in pro. per.

On April 12, 2000, plaintiff filed a legal malpractice complaint against defendants. Plaintiff alleged defendants agreed to represent him in his civil rights action against San Quentin officials, filed in the United States District Court for the Northern District of California. Defendants allegedly accepted representation on a contingency basis, and agreed to pay all costs.

Plaintiff further alleged that defendants failed to exercise reasonable care or skill in the conduct of their representation, failed to inform plaintiff that defendant Franck was suspended from the practice of law, and left the conduct of the trial to the purportedly inexperienced Gargaro. Plaintiff sought damages of $250,000, plus costs and attorney's fees—which plaintiff was required to pay, which defendants failed to pay, and which were apparently deducted from plaintiff's inmate account.

On April 25, 2000, plaintiff filed Declarations Concerning Service pursuant to the Superior Court of San Francisco County, Local Rules, rule 3.3A, informing the superior court that defendants had been served with the complaint by mail.

On August 17, 2000, plaintiff filed a Status and Setting Conference Statement, using a form apparently approved by the superior court. The statement set a status conference for September 15, 2000, and made it clear plaintiff was in pro. per. Plaintiff asked for a jury trial and estimated trial would last four days. Plaintiff agreed to participate in mediation and an early settlement program.

On September 7, 2000, the superior court, per Commissioner Arlene T. Borick, filed an order canceling the September 15 status conference and rescheduling the conference for March 30, 2001.

Both the record on appeal and the superior court file contain a second Status and Setting Conference Statement from plaintiff, dated February 7, 2001, but not filed by the court. The second statement referred to the status conference set for March 30, 2001, and again made it clear plaintiff was in pro. per. Plaintiff again asked for a jury trial and

estimated trial would last four days. Plaintiff again agreed to participate in mediation and an early settlement program.

On February 14, 2001, plaintiff filed a "Petition for Writ of Habeas Corpus ad Testificandum" to require the warden of San Quentin to bring plaintiff before the court for the March 30 status conference.[1] The petition noted that "plaintiff[']s appearance is mandatory, unless the court wishes an alternative solution to plaintiff's appearance." Nothing in the record indicates the superior court responded to the petition.

On March 22, 2001, the superior court, again per Commissioner Borick, filed an order canceling the March 30 status conference and rescheduling the conference for September 28, 2001.[2]

Both the record on appeal and the superior court file contain two documents from plaintiff dated August 13, 2001, but not filed with the court: a second Petition for Writ of Habeas Corpus ad Testificandum, to compel plaintiff's appearance at the September 28 status conference; and a motion for summary judgment. Plaintiff claims these documents were returned to him unfiled on September 9, 2001. As we have noted, the documents in the superior court file bare no filing stamp. The documents likewise do not appear in the superior court's docket entries for this case, denominated the "Register of Actions"—which is part of the record on appeal. Nothing in the record, including the Register of Actions, indicates the superior court responded to the habeas petition or the motion for summary judgment.

On October 5, 2001, the superior court issued to plaintiff an order to show cause (OSC) "why this action should not be dismissed or why sanctions should not be imposed

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[1] Historically, a writ of "habeas corpus ad testificandum," which translates into "that you have the body to testify," is "[a] writ used in civil and criminal cases to bring a prisoner to court to testify." (Black's Law Dict. (7th ed. 1999) p. 715, col. 2.) As defendants observe, this common law writ has been superseded in California by statute. (See *In re Bagwell* (1938) 26 Cal.App.2d 418, 419-420; 14 Ops.Cal.Atty.Gen. 59, 63-64 (1949).)

[2] Subsequent superior court orders were signed by Commissioner Borick unless otherwise indicated.

. . . for failure to take all steps necessary to bring this case to judgment or dismissal . . . ." The OSC was set for hearing on January 28, 2002. We may safely assume the court issued the OSC in part because plaintiff, incarcerated at San Quentin, did not appear for the September 28 status conference.

On December 18, 2001, plaintiff filed a response to the October OSC. The response was dated December 13. In his response, plaintiff states he has "complied promptly and explicitly to all [the court's] orders." He also notes his August 13 documents were returned unfiled on September 9. He argued he had tried to secure his attendance at status conferences with the "ad testificandum" habeas petitions, and "ha[d] done nothing to hinder the moving forward of his case and has done all he knows how to do for the advancement of his case." He stressed his pro. per. status and noted that in a separate document he was moving for the appointment of counsel.

Both the record on appeal and the superior court file contain the motion of appointment of counsel. The motion is also dated December 13, 2001, but bears no filing stamp. The motion does not appear in the Register of Actions.

In his affidavit in support of the motion, plaintiff stated he was being denied access to the courts because his motions were returned unfiled, which plaintiff claimed had happened more than once. He noted he was an indigent prisoner held in a unit with very limited access to the prison law library. Plaintiff further stated: "Plaintiff cannot move forward with his action when his motions are being refused filing and plaintiff's due process rights are not afforded him. Wherefore plaintiff seeks the appointment of counsel to facilitate the going forward with his action." He also claimed his action had merit.

Nothing in the record indicates the superior court responded to the December 13, 2001 motion for appointment of counsel.

Both the record on appeal and the superior court file contain two more documents from plaintiff dated December 13, 2001: a request for entry of default and a second motion for summary judgment. Neither document bears a filing stamp. Neither appears

in the Register of Actions. Nothing in the record indicates the superior court responded to the request or the motion.

On February 5, 2002, the superior court issued a second OSC, in the form of a written order to plaintiff that he appear telephonically on May 9, 2002, "to show cause why [he] should not be sanctioned for failure to obtain an answer(s) from, or enter default(s) against, defendant(s)." We shall refer to this as the February OSC. (It is not clear from the record whether the October OSC was resolved.)

Both the record on appeal and the superior court file contain a "Motion to Show Plaintiff has complied with order, and has notified prison officials of up-coming telephonic call with court." The motion is signed by plaintiff and dated March 17, 2002. The motion does not bear a filing stamp. The motion does not appear in the Register of Actions.

Both the record on appeal and the superior court file contain another document from plaintiff dated March 17, 2002—plaintiff's response to the February OSC.[3] Plaintiff again stated he was in compliance with the court's orders. He noted he had previously moved for entry of default. He complained that defendants had not responded to his correspondence. He noted he had previously moved for the appointment of counsel and stated he was making a second request for counsel under a separate cover. He again complained that the court was not responding to his various motions and was returning them unfiled, and complained of violation of his due process rights.

The March 17 response to the February OSC bears no file stamp. It does not appear in the Register of Actions. There appears to be no second motion for appointment of counsel bearing that date in the record on appeal or in the superior court file.

On April 16, 2002, plaintiff filed a "second submission" of his March 17 motion to show his compliance with the court order setting up his telephonic appearance. In this

[3] Plaintiff captioned this document a "second response," presumably because he had filed a previous response to an OSC—the one issued in October 2001.

document, dated April 4, 2002, plaintiff claimed the March 17 motion had been returned to him unfiled.

Also on April 16, 2002, plaintiff filed another response to the February OSC. He stated he had filed two previous requests for entry of default and had them both returned unfiled. He also stated he had twice requested counsel "and has submitted a third request." No such request dated April 16, 2002 seems to be in the record on appeal or the superior court file. Plaintiff again complained of motions being returned to him unfiled and of denial of his right of access to the courts.

Apparently plaintiff again requested entry of default on April 18, 2002. That same day, the superior court clerk filed a document stating that plaintiff's "Request to Enter Default submitted on APR-18-2002 can not be processed" because "[o]riginal summons or declaration (and order) re: lost summons required (CCP 417.30)" and "[o]riginal proof of service not filed (CCP 417.10, CCP 417.30)[.]"

According to the Register of Actions, on May 10, 2002, the superior court continued the May 9 OSC hearing to December 5, 2002.

During the summer and fall of 2002, plaintiff apparently had some difficulty in getting the summons and proofs of service filed in proper form. The record on appeal and the superior court file contain numerous letters he wrote to the court.

On December 4, 2002, the superior court issued a third OSC to plaintiff "why [he] should not be sanctioned for failure to file proof of service on defendant(s) and obtain answer(s), or enter default(s)." This OSC (the December OSC) was set to be heard January 30, 2003. The December OSC contains no provision for a telephonic appearance, unlike the February OSC.[4]

On January 6, 2003, plaintiff filed a response to the December OSC. Plaintiff stated he had been attempting to file the proof of summons, but filing was rejected by the clerk of the court. (The record does suggest the summons may not have been in proper

[4]From entries in the Register of Actions, it seems the superior court effectively merged the February OSC and the December OSC into one OSC set for hearing January 30. We will refer to that OSC as the December OSC.

form.) Plaintiff again complained that he was in pro. per. and was being denied access to the courts. He again stated he had done nothing to hinder the progress of his lawsuit. He stated that under separate cover he was submitting (1) yet another motion for appointment of counsel, and (2) a petition for habeas corpus ad testificandum to compel his attendance at the January 30 OSC hearing.

Although it was filed January 6, 2003, plaintiff's response to the December OSC is dated December 8, 2002. Both the record on appeal and the superior court file contain two additional documents dated December 8: (1) the separate motion for appointment of counsel, and (2) the separate petition for habeas corpus ad testificandum to compel plaintiff's attendance at the January 30 OSC hearing. Neither of these documents bears a file stamp. Neither are listed in the Register of Actions. Nothing in the record indicates the superior court responded to the habeas petition or to the December 8, 2002 motion for appointment of counsel.

According to the Register of Actions, on February 4, 2003, the court continued the January 30 OSC hearing to June 5, 2003.

The next item in the chronology of this case appears to be the filing of defendants' verified answer on May 16, 2003.

On June 6, 2003, the superior court filed an order scheduling a mandatory settlement conference for November 12, 2003, and setting the matter for jury trial on December 1, 2003. An entry of June 6 in the Register of Actions indicates the hearing on the December OSC, last set for June 5, "is off calendar."

On July 2, 2003, plaintiff filed a document entitled, "Plaintiff's Submission Showing Defendants . . . have been Properly Served with Summons and Copy of Complaint." This document also purported to be plaintiff's "response" to the verified answer. This document was dated May 21, 2003, and may have been mailed from the prison before plaintiff received the June 6 order.

Two things happened on November 4, 2003: plaintiff filed a petition for writ of habeas corpus ad testificandum to compel his attendance at the November 12 settlement

conference, and the superior court filed an order continuing the conference to November 25, 2003. It is not clear which of the two filings occurred first.

According to the Register of Actions, the court sent out a notice of non-payment of jury fees on November 7, 2003.

On November 20, 2003, plaintiff filed a "Response to . . . Notice of Non-Payment of Jury Fees," noting he was an indigent prisoner. He also noted he had filed several motions for appointment of counsel, and once again filed such a motion under separate cover.

Also on November 20, 2003, plaintiff filed an ex parte request for continuance of the December 1 jury trial. He claimed the trial date "must be a mistake" because his numerous motions had been returned unfiled and he had received no discovery from defendants. He asked for a continuance of 45 days. He again stated he would file a motion for appointment of counsel under a separate cover.

According to the Register of Actions, the mandatory settlement conference was "removed from [the] settlement conference calendar" on November 25, 2003. The Register entry states, "No settlement reached. Trial date maintained." On November 26, 2003, the matter was taken off the jury calendar for non-payment of fees, and reset for court trial on December 1.

At this point we must mention several documents found, unfiled, in the superior court file separate from the other case documents. As in most court files, the case documents in plaintiff's file—i.e., the ones we have mentioned in the foregoing discussion as being part of the file or the record on appeal—are placed in the right side of the file, bound together by a two-pronged metal fastener at the top of the page. But there is a group of documents attached with a small binder clip on the left side of the file, labeled with a yellow post-it note on which is written, "Attach to file." These documents, all dated November 26, 2003, are:

• Three documents purporting to be subpoenas seeking the attendance at trial of (1) Honorable Susan Illston, who apparently was the District Court Judge who presided

over plaintiff's civil rights action; (2) an Assistant Attorney General who apparently participated in that action; and (3) three "John Doe" witnesses;

• A four-page motion for appointment of counsel, which plaintiff claimed was his seventh, and which again complained that the clerk's purported refusals to file plaintiff's motions violated his constitutional right of access to the courts;[5]

• A motion in limine to exclude from any mention at trial plaintiff's commitment offense (first degree murder);

• A motion for an order compelling defendants to respond to plaintiff's interrogatories and requests for admissions and for production of documents;[6]

• A petition for habeas corpus ad testificandum to compel an inmate witness's attendance at trial;

• Plaintiff's proposed witness list; and

• A peremptory challenge of Commissioner Borick.

It is unclear why these documents were separated from the others in the file, or why they were not filed by the superior court clerk. These documents also do not appear in the Register of Actions.

On January 26, 2004, Honorable Donna Hitchens, Presiding Judge of the San Francisco Superior Court, signed an order dismissing plaintiff's action. The order recites that the matter was set for trial December 1, 2003, but "[t]here was no appearance by the plaintiff . . . ." The order of dismissal was filed January 29, 2004. Judgment of dismissal was entered the same day.

II. DISCUSSION

Plaintiff contends the dismissal was erroneous because the superior court denied him his right of access to the courts. We agree. Under the authority of *Wantuch*, we

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[5] It is unclear whether this was the motion referred to in the November 20 response to the notice of non-payment of jury fees. According to plaintiff, that motion was dated November 11, 2003, not November 26.

[6] On December 3, 2003, the court field a document from plaintiff, dated November 25, 2003, by which he purported to accept as admitted or true matters covered by the supposedly unanswered request for admissions and interrogatories.

reverse the judgment of dismissal and remand to the superior court for further proceedings, so that the court can fashion means to preserve plaintiff's right of access to the court.

It is well settled that an indigent prisoner who is a *defendant* in a bona fide civil action which threatens his personal or property interests "has a federal and state constitutional right, as a matter of due process and equal protection, of meaningful access to the courts in order to present a defense." (*Wantuch, supra,* 32 Cal.App.4th at p. 792, citing *Yarbrough v. Superior Court* (1985) 39 Cal.3d 197, 203-207; and *Payne v. Superior Court* (1976) 17 Cal.3d 908, 913-919, 924.)

An indigent prisoner who is a *plaintiff* in a bona fide civil action enjoys a statutory right of access to the courts. Penal Code section 2601, subdivision (d) provides that a prisoner has the right to "initiate civil actions . . . ." As *Wantuch* instructs, "In the case of an indigent prisoner initiating a bona fide civil action, this statutory right carries with it a right of meaningful access to the courts to prosecute the action. [Citation.]" (*Wantuch, supra,* 32 Cal.App.4th at p. 792.) If an indigent prisoner exercises his statutory right to initiate a bona fide civil action, he "may not be deprived . . . of meaningful access to the civil courts" simply because of his inmate status. (*Wantuch, supra,* at p. 792.)

"Meaningful access to the courts is the 'keystone' of an indigent prisoner's right to . . . prosecute bona fide civil actions. [Citations.]" (*Wantuch, supra,* 32 Cal.App.4th at p. 792.) But meaningful access does not mandate, and the prisoner has no specific right to, any particular remedial means to ensure access to the courts. (*Id.* at pp. 792-793.) Rather, the superior court "determines the appropriate remedy to secure access in the exercise of its sound discretion." (*Id.* at p. 794.)

Those remedies include: (1) deferring the action until the inmate is released from prison; (2) appointing counsel; (3) physically transferring the inmate from the state prison

in order to appear in court;[7] (4) using of deposition testimony in lieu of the physical appearance of the inmate;[8] (5) conducting trial within the confines of the prison; (6) telephonically conducting pretrial proceedings, including status and settlement conferences and motion hearings; (7) using the various mechanisms of written discovery; (8) using media technology such as closed circuit television;[9] and (9) using creative, innovative procedures under the court's broad authority to conduct and control its proceedings in the furtherance of justice, pursuant to Code of Civil Procedure section 128, subdivisions (a)(3) and (a)(5). (See *Wantuch, supra,* 32 Cal.App.4th at pp. 792-793.)

As *Wantuch* observes, an inmate civil plaintiff has no right to appointed counsel or to be physically present in court. (*Wantuch, supra,* 32 Cal.App.4th at pp. 793-794.) But that does not relieve the trial court of its duty to "determin[e] the appropriate remedy to secure access," taking into consideration factors such as "the nature of the action, the potential effect on the prisoner's property, the necessity for the prisoner's presence, the prisoner's role in the action, the prisoner's literacy, intelligence and competence to represent himself . . . the stage of the proceedings, the access of the prisoner to a law library or legal materials, the length of the sentence, the feasibility of transferring the prisoner to court and the cost and inconvenience to the prison and judicial systems. [Citations.]" (*Id.* at p. 793.)

We review such a determination of access remedies by the standard of abuse of discretion. (*Wantuch, supra,* 32 Cal.App.4th at p. 794.) But here we essentially have nothing to review, because the superior court failed to make any such determination.

Faced with plaintiff's repeated requests, if not demands, for access to the courts, the superior court responded with inaction. The court failed to file several of plaintiff's

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[7] While the writ of habeas corpus ad testificandum no longer exists in California, a court has the statutory power to compel the production of an inmate to testify as a witness at trial. (Pen. Code, §§ 1567, 2620.)

[8] Authorized by Penal Code sections 2622 and 2623.

[9] Authorized by Penal Code section 2624.

motions. The court did not provide that status and settlement conferences could be conducted telephonically—although the court did provide for a telephonic hearing on an OSC directed *against* plaintiff. The court failed to rule on plaintiff's repeated requests for the appointment of counsel. Knowing plaintiff sought to be transferred to court to participate in status and settlement conferences—even though he used an antiquated form of a habeas petition to procure such transfer—the court did not respond by either exercising, or explicitly declining to exercise, its statutory power to order transfer.

Indeed, the court did not respond to plaintiff at all—except to issue orders to show cause *against* plaintiff, threatening to dismiss his action for failing to bring the case to trial. Given the court's systemic refusal to employ remedies to ensure plaintiff's access to the courts, the orders to show cause are, some might think, somewhat puzzling.

We appreciate the superior court's workload and we recognize that a sizeable majority of pro. per. actions are meritless—and perhaps not even bona fide. But that does not relieve the trial court of its duty to consider and rule on motions, and to employ appropriate remedies to ensure access to the courts to enable an inmate plaintiff to prosecute a bona fide civil action. Whatever the merits of plaintiff's suit, he appears to have taken numerous steps to prosecute his action—as we have detailed above. Many of his documents were not responded to, and some were not even filed. We are compelled to hold that the superior court abused its discretion by failing to follow *Wantuch* and take some suitable steps to ensure plaintiff's meaningful access to the courts.

III. DISPOSITION

The judgment of dismissal is reversed. The cause is remanded to the superior court to exercise its discretion to employ reasonable remedies to ensure plaintiff's meaningful access to the courts, consistent with the discussion set forth above. We stress we are not suggesting or requiring that the superior court impose any particular remedy.[10]

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Marchiano, P.J.

We concur:

_____
Swager, J.

_____
Margulies, J.

[10] For instance, we note the superior court could determine, in its discretion, that plaintiff's action is not bona fide—thereby rendering *Wantuch*'s requirements inapplicable. (*Wantuch, supra,* 32 Cal.App.4th at p. 796.)

We note that, in light of our disposition, we need not address other issues raised by plaintiff.